No. [redacted] 42

# In the Supreme Court of the United States

OCTOBER TERM, 1943

M. CLAUD SCREWS, FRANK EDWARD JONES, AND JIM BOB KELLEY, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

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## CITATIONS

Cases:

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## MEMORANDUM FOR THE UNITED STATES

### OPINIONS BELOW

The majority (R. 217–223) and dissenting (R. 223–227) opinions in the circuit court of appeals and the specially concurring opinion of Judge Waller (R. 232) on petition for rehearing are not yet reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered January 14, 1944 (R. 227), and a petition for rehearing (R. 228–231) was denied February 18, 1944 (R. 232). The petition for a writ of certiorari was filed March 18, 1944. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides in pertinent part:

> SECTION 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 20 of the Criminal Code (18 U. S. C. § 52) provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such in-

habitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

## QUESTION PRESENTED

Petitioners, as state officers, arrested one Hall and beat him to death without justification. The question presented is whether their action constituted an offense under Section 20 of the Criminal Code.

## STATEMENT

Petitioners were convicted on October 7, 1943, in the District Court of the United States for the Middle District of Georgia, on counts 2 and 3 of a three-count indictment returned against them in that court on April 10, 1943 (R. 2–9, 10). Count 2 (R. 4–6) charged them with violating Section 20 of the Criminal Code and count 3 (R. 6–9) charged them with conspiring to violate that section, contrary to Section 37 of the Criminal Code (18 U. S. C. 88).[1] Each petitioner was sentenced to a total of three years' imprisonment and to pay a fine of $1,000 (R. 11–15).

In substance, count 2 (R. 4–6) charged that on January 29 and in the early hours of the morning of January 30, 1943, petitioners—two of whom were state officers (Screws, the sheriff of

[1] Count 1 of the indictment, which charged a violation of Section 19 of the Criminal Code (18 U. S. C. 51), was dismissed by the court upon demurrer (R. 24).

Baker County, Georgia, and Jones, a police officer of Newton, Georgia) and the other an aider and abetter—arrested and caused the arrest of Robert Hall, a Negro citizen of the United States and an inhabitant of the State of Georgia, brought and caused him to be brought to the well in front of the courthouse at Newton, Georgia, and there unlawfully and wrongfully beat him about his head with a blackjack and with their fists, causing his death. It was further alleged that petitioners' action was under color of the laws, statutes, ordinances, regulations, and customs of the State of Georgia, Baker County, and the municipality of Newton, Georgia, and deprived Hall of the following rights, privileges, and immunities secured to him and protected by the Fourteenth Amendment to the Constitution: to be secure in his person and to be immune from illegal assault and battery; to be not deprived of liberty and life without due process of law; to be not denied equal protection of the laws; to be not subjected to different punishments, pains, and penalties by reason of his race or color than are prescribed for the punishment of other citizens; to be tried upon the charge on which he had been arrested, by due process of law, and, if found guilty, to be sentenced and punished in accordance with the laws of the State of Georgia.[1]

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[1] In *United States* v. *Classic*, 313 U. S. 299, 329, this Court held that Section 20 of the Criminal Code authorizes the

Count 3 (R. 6–9) charged that the petitioners conspired to commit the offense described in count 2 and that in furtherance of this conspiracy they committed specified overt acts.

The evidence supporting these allegations of the indictment may be briefly summarized as follows:

Petitioner Screws was at the time of the offenses charged sheriff of Baker County, Georgia, and had been such for seven years (R. 36, 168). Petitioner Jones was a policeman in the city of Newton, Georgia (R. 36), and petitioner Kelley was a local resident designated by Screws as a special deputy to assist Jones in arresting Hall (R. 170).

The evidence shows that in December 1942, Jones, apparently without justification, had taken possession of Hall's pistol and had given it to Screws (R. 36–37, 41–42). When Screws refused to return the gun, Hall appealed to the local

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punishment of two different offenses: (1) the offense of wilfully subjecting any inhabitant to the deprivation of rights secured by the Constitution, and (2) the offense of wilfully subjecting any inhabitant to different punishments on account of his alienage, color, or race, than are prescribed for the punishment of citizens. Petitioners do not contend that count 2 charges these two different offenses and is hence duplicitous, and it would seem evident that the allegation that a different punishment was inflicted upon Hall because he was a Negro was intended to be merely a specification in detail of one of the rights guaranteed by the Fourteenth Amendment alleged to have been denied him, i. e., the equal protection of the laws.

grand jury, which called Screws before it on the matter. Screws told the grand jury that he was going to keep the pistol until the Judge ordered him to return it; that "if any of these damned negroes think they can carry pistols, I am going to take them, that they don't carry them to shoot birds with, * * *." The jury concluded that there was no relief they could give Hall. (R. 40–41.) When Screws persisted in his refusal to return the gun, Hall retained counsel who wrote Screws requesting return of the gun. This letter was admittedly received by Screws on January 29, 1943. (R. 43–44, 176, 194–195.)[3] Following receipt of this letter, Screws in the early evening of January 29 entered a local store and stated that he wanted someone to accompany him, "that he was going to go and get the black SB and going to kill him, that he had lived too long then" (R. 46, 50–51). Later that evening at a local barroom at which Screws and the two other petitioners were drinking (R. 50–57), the barkeeper, because Screws had been drinking, exhorted him not to go through with the proposed arrest that night (R. 52–53).

Shortly after midnight, while Screws waited at the well in front of the Newton courthouse, Kelley and Jones, at Screws' direction, drove in

[3] It was on the night of January 29 that Hall was taken into custody by Screws and the other petitioners and beaten to death.

Screws' car to Hall's home (R. 65, 170).[4] Jones roused Hall from bed, asserting that he had a warrant for his arrest for stealing a tire (R. 59).[5] While Hall was dressing, Jones recounted that Hall had been before a grand jury in an effort to recover his pistol and had been to see Mr. Culpepper (Hall's counsel) (R. 59–60). Jones, noticing a shotgun behind Hall's bed, took the gun, unloaded it, and told Hall that he would keep it until Hall returned (R. 59, 60, 71). As Hall was taken to the car he was handcuffed and was placed in the rear seat (R. 61, 71, 74, 170), while the shotgun was placed in the front seat between Kelley and Jones (R. 71, 72, 74). When the car arrived at the courthouse square where the well

[4] Earlier in the evening Kelley had driven to Hall's home and under the pretense of seeking Hall, who was a mechanic, to repair his car, had ascertained that Hall had not yet returned form work (R. 58).

[5] Petitioners, in their statements to the F. B. I. and through the testimony of Screws, claimed that the violence wrought upon Hall resulted from his resistance to arrest pursuant to a warrant charging him with theft of a tire belonging to one George Durham (R. 65–66, 71–73, 74–75, 171). Screws, however, stated to an agent of the F. B. I. that he did not know who had written the warrant (R. 68) or who had entered it on the docket, that he did not recognize the handwriting appearing on its face, and that he had not written it nor made the docket entry (R. 69). A handwriting expert employed by the F. B. I. testified that the warrant was written at least in substantial part by Screws (R. 125–132, 147–148). Neither George Durham, who petitioners claimed procured the warrant, nor the justice of the peace who was supposed to have issued the warrant, was offered as a witness by the defense.

at which the sheriff waited was located (R. 71). Screws opened the door and ordered Hall to get out (R. 65). When Hall alighted from the car, all three petitioners began beating him with their fists and a blackjack (R. 66, 72, 75, 76, 171). Hall was soon knocked to the ground and thereafter for a period of at least 15 to 30 minutes petitioners continued to beat him (R. 80–82, 83–84, 85–87, 89–94, 98–99, 99–101). Witnesses testified that petitioners were loud and profane (R. 83, 89, 90, 94–95, 97) and were heard to cry frequently, "hit him again, damn him, hit him again" (R. 84, 87, 90, 94). The blows administered to Hall were of such fury they could be heard in nearby houses (R. 86–87, 89, 90). Twenty or thirty minutes after the beating began a shot was fired in the courtyard and thereafter the noise subsided (R. 84, 86, 88–89, 90, 94–95, 98, 100).

After the treatment of Hall above described, Kelley and Jones dragged him feet first from the well through the courthouse yard into the jail (R. 86, 98, 102, 103–104, 105). There they threw him on the floor in a dying condition and still handcuffed (R. 102, 104, 105, 107). According to witnesses then in jail, Jones returned to the jail some 15 or 20 minutes later and removed the handcuffs from the unconscious Hall (R. 103, 105, 107). Jones was heard to say in the jail "we have drug him four miles" (R. 103, 121). Soon thereafter Screws called an ambulance and Hall was

removed to a hospital (R. 171) where he died within an hour (R. 111).*

After the killing Screws told an F. B. I. agent that he had known Hall all his life and had had trouble with him for two years; that Hall was a "biggety negro, that he considered himself to be a leader among the colored people in the community" (R. 64; see also R. 177). Shortly after Hall had died Kelley, upon being told of his death, stated that "it was just another negro dead" (R. 48). And Jones, according to the testimony of a friend, on the day after the killing asserted that the negro had "acted so damn smart", had hired an attorney and gone before the court to recover his gun; that "they went out there that night with a warrant and arrested him and handcuffed him and brought him to town and the negro put up some kind of a talk about wanting to give bond * * * and they beat hell out of him * * *" (R. 120). When Jones stated that Hall tried to shoot him at the well and the witness inquired how that could happen while

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*The attending physician testified that he was positive Hall's death was due to blows on the right side of his skull (R. 111). The undertaker testified that Hall was unrecognizable when first brought to him (R. 112), that the skin on his chest and other parts of his body was scraped off, that his right ear was mutilated, and that his head was crushed (R. 113–114). His wrists, according to the testimony of a police officer, had double-marked imprints around them which corresponded with the impressions generally left by handcuffs (R. 116, 117; see also R. 114).

Hall was handcuffed, Jones replied "well we finished him off and that is all" (R. 120–121).

## ARGUMENT

Petitioners contend (Pet. 5–10) that since their conduct in beating Hall to death was contrary to state law, it could not be deemed state action and that, since the rights of which Hall was deprived were rights protected by the Fourteenth Amendment[7] which applies only to state action, they therefore committed no offense under Section 20 of the Criminal Code. The purport of petitioners' argument is, apparently, that while their arrest of Hall was state action because it was within the scope of the authority delegated by the state to them as local police officers, their beating Hall to death in the course of the arrest was not state action because, concededly, they acted in excess of their delegated powers.

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[7] Petitioners do not argue in this Court, as they did in the court below, that the rights of which Hall was deprived were not rights secured or protected by the Constitution and laws of the United States. As the court below concluded (R. 220), "Clearly the right to be secure in one's person and to be immune from illegal arrest and battery, or the right not to be deprived of life or liberty without due process of law, and the right to enjoy the equal protection of the laws, are rights 'secured or protected' by the Constitution of the United States * * *."

The opinion of the dissenting judge below (R. 223–226) was in large part based on the view that Section 20 is unconstitutional because "there is in it no ascertainable standard of guilt, and the right to be precisely informed of the things to be charged as crimes is not practically preserved" (R. 225). While there have been no decisions passing di-

Section 20 of the Criminal Code protects "rights, privileges, or immunities secured or protected by the Constitution and laws of the United States" against willful deprivation by individuals acting "under color of any law, statute, ordinance, regulation, or custom." While it protects from deprivation rights secured by provisions in the Constitution other than those contained in the Fourteenth Amendement (*cf. United States* v. *Classic*, 313 U. S. 299), it was enacted initially to enforce that Amendment.* That Amendment operates, of course, solely upon state and not individual action. *Hodges* v. *United States*, 203 U. S. 1; *United States* v. *Harris*, 106 U. S. 629, 640. In so far, therefore, as Section 20 is attempted to be applied to the deprivation of rights

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rectly upon the constitutionality of Section 20, this Court long ago upheld the validity of its analogous companion section, Section 19 (18 U. S. C. 51). *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Waddell*, 112 U. S. 76; *Motes* v. *United States*, 178 U. S. 458, 462; *United States* v. *Moseley*, 238 U. S. 383, 386. It also recently sustained a conviction under Section 20 without any suggestion of doubt as to its constitutionality. *United States* v. *Classic*, 313 U. S. 299. Under these circumstances there is certainly no basis for a consideration of the constitutionality of the section under the "plain error doctrine."

Insofar as the dissenting judge additionally held that petitioners' conduct did not come within the purview of the statute (R. 226–227), his reasoning is answered *infra*.

*89 Cong. Globe, 1536; 91 Cong. Globe 3480, 3658, 3690; 92 Cong. Globe 3807–3808, 3879; Flack, *The Adoption of the Fourteenth Amendment* (1908). See also *Hague* v. *C. I. O.*, 307 U. S. 496, 510; *United States* v. *Moseley*, 238 U. S. 383, 387, 388.

protected by the Fourteenth Amendment, it would seem to follow that what is deemed state action under the Amendment must likewise be held to be action under color of law under Section 20. (Cf. *Hague* v. *C. I. O.*, 307 U. S. 496, 510, 525–526).

The beating of Hall to death was not the act of private individuals. Although unjustified,[9] it occurred in the course of an arrest by state officers exercising state power in connection with a state function having its roots in antiquity. Regardless of whether the warrant of arrest was a valid one (see *supra*, p. 7, f. n. 5), it is clear,

[9] The jury necessarily found that the beating administered to Hall was without justification, since the court charged the jury as follows (R. 211):

"I said to you, gentlemen of the jury, that if an officer has a prisoner under arrest and it becomes necessary, in order to prevent the killing of the officer by the prisoner or the inflicting of serious bodily harm upon him, that the officer would have a right to use such force as would be necessary to prevent the injury or the killing of himself, but only that much force and no more. [See R. 208–209.] I charge you in that connection that in this case you will determine from the evidence what the situation was around the well during that occurrence that you have heard about, what things have been proved, in your opinion. Get what the exact situation actually was and if from that situation as you find it to be, you think that the officers could reasonably conclude under those circumstances that it was necessary to do what they did do to prevent injury or death to themselves, then they would have a right to do it, but they would have the right only to do what they thought under the circumstances was absolutely necessary in order to prevent injury or death to themselves."

that petitioner Screws, as sheriff,[10] petitioner Jones, as a local police officer, and petitioner Kelley, as a special deputy sheriff,[11] acted under color of their official positions in subjecting the person of Hall to their will (see R. 207–208). In fact it was petitioners' contention throughout the trial that in arresting Hall they acted in the lawful exercise of the power vested in them as state functionaries; that they were performing their official duties in executing a warrant (see R. 221). The assumption that their continuous course of conduct may be divided, from the standpoint of state action, into two parts, one, the arrest, constituting state action because, petitioners claim, it was lawful, and the other, the killing, not constituting state action because it was not sanc-

[10] The sheriff is a state officer authorized by state law to execute warrants, 24 Ga. Code Ann. 2801, 2804, 2813, and he is authorized to appoint one or more deputies to assist him in the performance of his duties, 24 Ga. Code Ann. 2811.

[11] Although the indictment did not specifically name petitioner Kelley as a local officer but as an aider and abettor (R. 5) and a conspirator (R. 6), we have referred to him as a state officer, since petitioner Screws' testimony at the trial disclosed that he had designated Kelley as his deputy in making the arrest (R. 170). Whether he was properly designated as a deputy is of no materiality in this case, since it is clear from the evidence that he was an aider and abettor and therefore a principal. 18 U. S. C. 550 provides that "whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

tioned by state law, is opposed by numerous decisions of this Court. Long ago this Court in *Ex parte Virginia,* 100 U. S. 339, 347, held, in construing the Fourteenth Amendment, that whoever "by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name ~~of~~ and for the State, and is clothed with the State's power, his act is that of the State." The very same argument which petitioner now advances was considered at length by this Court in *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, and flatly rejected as an "artificial construction" of the Fourteenth Amendment (p. 286), this Court saying (p. 287):

> * * * the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. * * * the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing

with the officer and the result of his exertion of power.[12]

And only three terms ago, in *United States* v. *Classic*, 313 U. S. 299, where the acts of state election officials were plainly contrary to state law, this Court said, at p. 326, in construing the very section with which we are here concerned, that "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law", citing *Ex parte Virginia, supra, Home Tel. & Tel. Co.* v. *Los Angeles, supra,* and *Hague* v. *C. I. O., supra.*

Petitioners cite, as in conflict with the decision below, the decision of the Circuit Court of Appeals for the Seventh Circuit in *Snowden* v.

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[12] See also, to the same effect, *Chicago, Burlington & Quincy R'd* v. *Chicago*, 166 U. S. 226, 233–234; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, 37; *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, 245–246; *Mooney* v. *Holohan*, 294 U. S. 103; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 342; *Cochran* v. *Kansas*, 316 U. S. 255; *Pyle* v. *Kansas*, 317 U. S. 213; Isseks, *Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials*, 40 Harv. L. Rev. 969.

For cases in the lower federal courts applying Section 20 to analogous factual situations, see *Culp* v. *United States*, 131 F. (2d) 93 (C. C. A. 8); *Catlette* v. *United States*, 132 F. (2d) 902 (C. C. A. 4); *United States* v. *Trierweiler*, 52 F. Supp. 4 (E. D. Ill.); *United States* v. *Sutherland*, 37 F. Supp. 344 (N. D. Ga.); cf. *Hague* v. *C. I. O.*, 101 F. (2d) 774, 781, 788, 789, 790 (C. C. A. 3), affirmed, 307 U. S. 496; *United States* v. *Buntin*, 10 Fed. 730 (C. C. S. D. Ohio); *United States* v. *Stone*, 188 Fed. 836 (D. Md.).

*Hughes*, 132 F. (2d) 476, which was affirmed, but on another ground, by this Court on January 17, 1944 (No. 57, present Term). In that case the sole ground of decision by the Circuit Court of Appeals was that action of a state primary canvassing board, which was contrary to state law, was not state action within the meaning of the Fourteenth Amendment. The court predicated its decision on the early decision of this Court in *Barney* v. *City of New York*, 193 U. S. 430, but recognized "that there is some question as to the current value of the *Barney* case as authority" in the light of subsequent decisions of this Court. It nevertheless thought that the *Barney* decision still stood and was a sound one. In this Court five of the Justices rested their affirmance not upon the ground upon which relief had been denied by the Circuit Court of Appeals, but upon the ground that the petitioner had failed to show that, as he claimed, he had been denied the equal protection of the laws, in violation of the Fourteenth Amendment, there being no allegation of intentional or purposeful discrimination. The five Justices, in an opinion by the Chief Justice, stated, as a reason for not resting their decision upon the ground that the action involved was not state action because contrary to state law, that "the authority of *Barney* v. *City of New York*, *supra*, on which the court below relied, has been so restricted by our later decisions [citing deci-

sions by this Court to which we have referred]," that our determination may be more properly and more certainly rested on petitioner's failure to assert a right of a nature such as the Fourteenth Amendment protects against state action." One Justice concurred in the result without separate opinion. The two dissenting Justices were of the view that the petitioner's allegations were sufficient to entitle him to an opportunity to establish that he was in fact the victim of discriminatory action. To reach this conclusion it was necessary, of course, for them to hold that the action of the state board was state action even though opposed to state law. One Justice concurred in the result reached by the majority but wrote a separate opinion. He alone expressed agreement with the Circuit Court of Appeals that the *Barney* case was controlling and was sound law. It was his view that the federal courts should not intervene in disputes over alleged discriminatory action by state officers in disobedience of state law until the highest state court had affirmed such action and made it the law of the state. He feared that unless that procedure were followed, "every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court." There was, of course, not before the Court

[11] See particularly the Court's treatment of the *Barney* decision in the opinion of Chief Justice White in *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 294.

a case such as this, where the discrimination and the denial of constitutional rights resulted in the taking of life by state officials without due process and where, as the evidence indicates, the availability of a state remedy, as a practical matter, was, at least, wholly problematical. (See the testimony of the Baker County Solicitor General at R. 42.) While we cannot deny that a conflict in principle exists between the decision of the Circuit Court of Appeals in this case and that of the Circuit Court of Appeals for the Seventh Circuit in the *Snowden* case, we think that this Court's unwillingness in that case to rest its affirmance upon the doctrine of the *Barney* case, as did the Seventh Circuit, so undermines the authority of the latter court's decision as to justify us in not concurring in the granting of a writ of certiorari to resolve the asserted conflict; and we believe the case was correctly decided below.

Respectfully submitted.

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